United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7622

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P/S

United States Court of Appeals

For the Second Circuit.

JAY JULIEN,

Plaintiff Appellant,

against

SOCIETY OF STAGE DIRECTORS AND CHOREOGRAPHERS, Inc.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANT-APPELLEE.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-7622

JAY JULIEN,

Plaintiff-Appellant,

-against-

SOCIETY OF STAGE DIRECTORS
AND CHOREOGRAPHERS, INC.,

Defendant-Appellee.

Brief of Defendant-Appellee

Statement of Issues Presented for Review

1. Are directors of first class stage productions employees of producers of such productions or are they independent contractors?

2. Were the findings of fact of the District Court "clearly erroneous"?

3. Is the Court empowered to enjoin the implementation of a collective bargaining agreement where one of the parties to the agreement is not before the Court?

Statement of the Case

Nature of the Case

Plaintiff demands damages and injunctive relief allegedly arising from defendant's violations of Section 1 of the Sherman Act, 15 U.S.C. §1. Defendant's defense is primarily based upon the statutory exemption of unions and employees from liability under the Sherman Act: Section 6 of the Clayton Act, 15 U.S.C. §17; Section 20 of the Clayton Act, 29 U.S.C. §52; and Section 1 of the Norris-LaGuardia Act, 29 U S.C. §101. At the trial plaintiff ventured to prove that defendant's members, directors and choreographers of first class stage productions*, are independent contractors rather than employees of producers of such productions and,

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* For the purposes of this action, the term "first class stage productions" may be understood to encompass the Broadway theater.

consequently, defendant is not entitled to the antitrust exemption.

Disposition in the Court Below

After trial without a jury, Hon. Charles E. Stewart found that "the overwhelming credible evidence in the record establishes that directors are employees of producers" and, consequently, plaintiff's demand for relief was denied. Judge Stewart's opinion appears in the Appendix at 356A-362A.

Statement of Facts

The Collective Bargaining Agreements

In 1962, three years after the defendant was incorporated as a labor organization representing directors and choreographers employed in the production of first class stage productions, a collective bargaining agreement was negotiated with the League of New York Theatres, Inc. ("League"), representing the producers of such productions (129A-132A). A second collective bargaining agreement executed in 1972 has continued to the present the League's recognition of the defendant as the collective bargaining representative of directors and choreographers.

The terms of the collective agreements are incorporated in individual service contracts between directors* and producers. The collective agreement, similar in many respects to other collective bargaining agreements in effect in the entertainment industry as well as in professional sports, fixes a floor on the compensation payable to directors, but leaves each director free to negotiate more favorable compensatory terms (278A, 301A). Both the 1962 and 1972 collective bargaining agreements provide for cost-of-living adjustments to directors' remuneration and "no strike, no lockout" provisions, and the 1972 agreement also includes a union dues checkoff and pension and welfare benefits (280A, 299A, 302A-303A).

The Denham Dispute

In 1965 plaintiff, a producer of first class stage productions and a member of the League (T.88)**, engaged

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* For the sake of brevity, the term "directors" shall include choreographers as well as directors.

** "T" references are to those pages of the trial transcript that have not been included in the Appendix.

Reginald Denham, a director and a member of the defendant society, to direct a play entitled "The Hostile Witness". Later a dispute arose between plaintiff and Denham relating to the compensation payable to Denham and, in accordance with the provisions of the 1962 collective bargaining agreement, the controversy was submitted to the American Arbitration Association. When plaintiff refused to pay the arbitral award granted in favor of Denham, defendant placed plaintiff's name on its "unfair list", a designation given to producers refusing to comply with an arbitration award. Plaintiff's name remained on the unfair list from January 1968 until March 1969, when he paid the award (T.83-84).

Plaintiff claims that during the period his name appeared on the list he was precluded from engaging a director for a play he had intended to produce (T.72). Although plaintiff's payment of the arbitral award to Denham in March, 1969, effected the removal of his name from the unfair list, he nevertheless elected not to produce another play until 1974 (T.84-85). At the trial plaintiff testified that the collective bargaining agreement required him to pay the director of the 1974 production a higher compensation than he deemed fair and reasonable (T.81-83).

These are the facts underlying plaintiff's claim that defendant has unlawfully acted in restraint of trade in

violation of Section 1 of the Sherman Act.

POINT I

A Director is an Employee of the Producer

The Supreme Court in Singer Mfg. Co. v. Rahn, 132 U.S. 518 (1889), established the test to ascertain the existence of the master (employer) and servant (employee) relationship.

> The relationship of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished....

Whether sufficient control has been retained rests upon the peculiar facts of each case; the totality of the circumstances must be considered as no single factor is controlling. N.L.R.B. v. A.S. Abell Co., 327 F.2d 1 (4th Cir. 1964). In any relationship it is unlikely that all criteria relevant to ascertainment of the status will point in one direction or the other, and in each case a balancing and judging of the various factors, in the light of the total situation, must be accomplished to reach a reasonable result. Taylor v.

Local 7, International Union of Journeymen Horseshoers, 353 F.2d 593 (4th Cir.),cert. den. 384 U.S. 969 (1965).

The Producer's Retention of Control

Before a director is hired, basic judgments relating to the interpretation and staging of the play are made by the producer and author. The producer then selects a director sympathetic to the artistic judgments already formulated (161A-162A). Obviously a director expressing views foreign to those of the producer is not likely to be engaged (T.41).

Usually a lengthy period of preparation, perhaps a year or more, precedes the beginning of rehearsals (329A), and during this period the producer may work with the author and director in preparing the play for the stage (80A-81A). Thereafter, at auditions attended by the producer as well as the author and director, the producer selects the cast in concert with the author and director (82A-83A). Although directors are frequently able to obtain "approvals" — a sort of veto power over selection of members of the cast — the producer need not surrender his right to select the cast, and not all directors are successful in negotiating such approvals (64A, 79A). The grant or denial of the right of cast approval is a negotiated right rather than one inherent to the director's

status (79A-80A). Even in those instances where a director has contracted for cast approval, producers have overriden a director's objection to the producer's choice for a particular role (116A-120A). Actors are hired by the producer, not by the director, are directly responsible to the producer, and are subject to discharge solely by the producer (194A, 241A).

A director does not possess the power to make final artistic judgments unless he has been delegated that power by the producer (138A-139A) and, as the trial evidence clearly demonstrates, such power is rarely delegated. Producers vary widely in their methods of exercising control over artistic decisions. Obviously, the producer attending every rehearsal has positioned himself to exercise day-to-day control over the production (168A). A producer attending rehearsals less frequently exercises control through his stage manager who is required to be present at each rehearsal session and daily reports to the producer (189A-190A). The absent producer may utilize the stage manager as a carrier of instructions to the director and thus exercise control over the production (189A-190A).

It is not uncommon for a producer to require changes in a scene (205A-208A) or even vary the sequence of scenes (190A), as well as demand that scenes be added (162A-167A) or deleted

(178A-183A), all over the objection of the director. A producer may design the set to suit his taste (225A), redesign the set (225A, 241A), or change its color (195A-196A). He may make lighting changes (224A) or require modification of lighting cues (246A). He may instruct the director when to rehearse an actor (124A, 253A), how an actor should portray his role (170A-171A), and what changes to make in an actor's lines (235A-236A). He has the power to order the director to rehearse one actor rather than another (242A) as well as to modify the rehearsal schedule (199A-203A). He may design the costumes (225A), and on more than one occasion, the producer has exercised his power over such details as the color of the leading lady's dress (220A, 224A). A producer retains and exercises control over every aspect of the production, and his control is not limited to the "result to be accomplished"; rather, his power includes control over the means to accomplish that result.

Plaintiff argues, however, that a director ordinarily makes many artistic decisions in the course of bringing the play to the stage. This of course is undisputed; what is the purpose of hiring a director unless he is to perform that function? But plaintiff begs the question. Whether the producer has the power to control the director in

making artistic decisions is the relevant issue. As already observed, the producer possesses this power and is not reluctant to exercise it in maintaining control over the production. Plaintiff has not and cannot point to any decision, which in a particular production may fall within the province of the director's functions, that the producer does not have the power to overrule.

Budgetary and Other Means of Control

Control over the director of the play is exercised by the producer in another, less direct but no less effective, manner. The budget is the creation of the producer; the director neither plays any role nor makes any decisions relating to its preparation or implementation (142A). But as the director is not empowered to authorize expenditures, the budget may be utilized by the producer to exercise control over the director. Alan Schneider, a director of great renown who testified on behalf of the defendant, related how the budget affected his functions as a director:

> Q. Can you give us specific examples of where the money or the budgets of the production controlled you in your direction?
>
> A. I will give you a very specific example, something that I learned very early. When

> one is directing a production out of town, ... and you have three sets .... The show is left with the third act set on stage. The next day if I want to rehearse the first act for some reason I cannot because the third act is on stage. In order to remove it at the end of the last night's performance that requires a crew ... and may involve several hundred dollars, or it may involve less than that.
>
> But the decision is made by the producer not to spend the money. I can't rehearse the first act.... So I have learned not to direct three set shows out of town, because I never can get to direct the first act. Now, that's a simple budgetary thing.
>
> .. in the case of a show in New York I couldn't rehearse getting toy soldiers through an archway.... I remember the show was called Blood Red Roses, and ... it was sort of a musical version of the Crimean War and we had archways, several archways, and we had little toy soldiers to simulate the various battles of the Crimean War and then when they were designed by somebody, they designed them exactly so they fit. But they fit within a millimeter. So I could never get the soldiers through the archway, but I wasn't allowed to rehearse that ever because it cost money.
>
> So every night the toy soldiers didn't get through the arch. Nor would they then rebuild the toy soldiers (228A-229A).

The director of a play now being presented on Broadway was required to alter the staging of one of the scenes because the producer allocated funds for six and not the ten actors the director felt were necessary (198A-199A). Another director was instructed to direct the play on "minimum scale"

(262A). The trial testimony convincingly demonstrates the power of the producer, by reason of his absolute control over the budget, to command adherence to his decisions.

Other decisions made by the producer also indirectly serve to exercise control over the director. The producer's selection of the scene designer and his approval of the scenery, his choice of the theater in which the play will be presented, and his decision whether the play will open out of town, each of these serves to control the director. And even if directors participate in these matters as they sometimes do, the final determinations must be the producer's as each of these decisions is influenced if not ordered by budgetary considerations.

POINT II

The Circumstances Attendant Upon the Discharge of a Director Do Not Establish an Independent Contractor Relationship

The control test must be applied to the circumstances peculiar to the Broadway theater. As observed in

United States v. United Scenic Artists, Local 829, 27 F.R.D. 499 (S.D.N.Y. 1961), the production of plays on an individual rather than a continuous basis does not permit a permanent relationship between any member of the production company and the producer. The production company is assembled for a single play and when the final curtain falls the company is disbanded and each member pursues his own interests. The brevity of the employment of directors as well as actors, lighting directors, scenic designers, and others is compelled by the nature of the profession and is not indicative of an independent contractor status. See also Independent Motion Picture Producers Ass'n., 200 NLRB No. 77.

Also unique to the profession is the method of compensating members of the production company. The length of the run of the play determines not only the profitability of the venture but the amount of compensation payable to the company's members. The sharing in the box office receipts by an actor -- undeniably an employee of the producer -- is a common practice. It is unique factors such as these that plaintiff fastens upon in his attempt to establish an independent contractor relationship.

The Discharge of a Director

Plaintiff's assertion that lack of control over the director is demonstrated through the circumstances attendant upon the dismissal of a director is misconceived. Plaintiff argues that if a producer must continue to pay a director after he is discharged, the producer's control over the director is illusory. The record establishes two basic fallacies to plaintiff's position; it is based upon hypotheticals and, even if based on fact, it nevertheless fails to establish the producer's lack of control over the director.

Plaintiff testified that if a director is discharged for failure to follow the producer's instructions relating to the manner in which the actors speak their lines, the producer nevertheless must pay the director the compensation provided in the director's contract (40A). The practice in the industry, he contended, demands a similar result if a director is discharged for refusing to accept the producer's orders concerning which actors to rehearse, whether an actor should be rehearsed with props, and the use or non-use of stage business (41A). On cross examination, however, plaintiff admitted that he knew of no instance of a discharge of a director in the Broadway theater for any of these reasons (50A), and the remainder of the trial record is devoid of any supporting

evidence. In fact, David Merrick, a producer of over eighty plays testifying on behalf of the plaintiff, has never discharged a director (26A-27A). Thus, plaintiff's contentions have no basis in fact.

In those rare instances where a director has been discharged over an artistic dispute with his producer, defendant has urged that such a discharge was not for cause. Although the greater part of his compensation is not paid until after the play opens, a director often renders services, contributing an enormous amount of creative energy to the realization of a successful production, for a period of a year or more before the beginning of rehearsals (22A, 56A, 80A, 261A). If a director is discharged over an artistic dispute, his contribution nevertheless remains in the play (96A, 145A-146A, 151A), and if he is not further compensated, the producer will reap the harvest of the director's efforts at little or no cost.

The defendant has insisted that directors should not be deprived of their compensation because of differences with the producer over artistic decisions. In other professions and industries, objective criteria exist to judge whether a discharge is or is not for cause (256A), but who is to declare that a producer's artistic judgments are correct and a director's wrong. To deny a director his

compensation in these circumstances would be totally inequitable.*

Although he may feel reasonably certain of receiving some compensation if discharged, a director is well aware that such occurrence will more than likely adversely affect his position in the profession. It may severely hinder his ability to obtain other directorial positions (232A, 255A). Alan Schneider succintly described the situation of the discharged director.

> Because the onus will be on me. I will be suspect. My status, image, my reputation, the way people look at my ability to deliver, there is no thing as a sure thing in the theater. People are always looking for someone who has just had a success (232A).

Moreover, a director has a limited number of opportunities for employment. Shepard Traube, a producer and director and another of defendant's witnesses, testified:

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* Unfortunately, from the point of view of directors, defendant's position has not always prevailed. Upon those rare instances where a director has been discharged, the director's compensation has been a matter for negotiation (125A).

> The jobs are precious few and very hard to come by, and directors, when they are employed by producers, are very responsive to their needs and wishes because their whole professional future and their ability to support their families depend on that relationship (144A).

Plaintiff erroneously assumes from these circumstances that a director is not required to abide by his producer's artistic decisions. The trial record is replete with specific instances to the contrary. The ad interrorum effect of a threatened discharge exists whether or not the director is paid, and the threatened discharge is as much a weapon of coercion and control as it is in other professions.

Other Circumstances Unique to the Theater

The production of a play is a creative and artistic endeavor demanding the formation of relationships peculiar to the profession. That a person may simultaneously render services for more than one employer may be indicative of an independent contractor relationship in other areas of endeavor but not in the theater. A director performs substantial services during the preparatory period prior to the commencement of rehearsals, but, as testified by one of plaintiff's

witnesses (65A-66A), the circumstances do not require him to devote full time to the production. Thus it is not unusual, except during the rehearsal period, for directors to be involved in more than one production. Actors experience similar circumstances; they often rehearse for a role in one play during the day while appearing in another play at night. But this does not make them independent contractors.

Plaintiff also notes that directors are not required to report to any specific place of work during the preparation period and thus, he argues, it is within the director's control to establish his own working conditions. This is far from accurate. During the preparatory period, the director meets with the producer and author presumably where it is most convenient for the three to assemble. The director does not have an office to which he orders the producer and author to appear. Once rehearsals begin, however, the director must report to the theater or other location the producer provides for rehearsals.

Finally, plaintiff argues that a producer is relegated to using his powers of persuasion to accomplish his will. Basic decisions in the theater are often the result of a consensus reached by the producer, author and director. But lacking a consensus, it is clear from the testimony that it is the producer who makes the final decision. This

circumstance is certainly not unique to the theater. In other professions and industries, the normal process is to utilize the knowledge, skills and talents of those capable of contributing to the decision making process. But ultimately, the responsibility for making the decisions falls upon the man at the top. Similarly, the failure to achieve a consensus among the producer, author and director requires the producer to make the decision, and if the director refuses to abide by it, he is subject to dismissal (178A-183A).

POINT III

Defendant is Entitled to Claim Exemption from the Antitrust Laws

Defendant's first line of defense is rooted in the statutory immunization of unions and employees from liability under the Sherman Act. Section 6 of the Clayton Act, 15 U.S.C. §17; Section 20 of the Clayton Act, 29 U.S.C. §52; and Section 1 of the Norris-LaGuardia Act, 29 U.S.C. §101.

The labor exemption was designed to enable employees to join together in unions for material aid and protection notwithstanding the prohibitions of the antitrust laws against

combinations in restraint of trade. The exemption applies to such employee activities as strikes, boycotts, picketing and other joint activities to further legitimate interests of employees. The Supreme Court has repeatedly ruled that this exemption, in light of its original purpose, is to be broadly interpreted. See e.g. Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1964); United States v. Hutcheson, 312 U.S. 219 (1941).

The exemption applies where the employer-employee relationship is "the matrix of the controversy". Columbia River Packers Ass'n. v. Hinton, 315 U.S. 143 (1942). Unlike the authors in Ring v. Spina, 148 F.2d 647 (2nd Cir. 1945) and the composers and lyricists in Bernstein v. Universal Pictures, Inc., 517 F.2d 976 (2nd Cir. 1975), the indicia of an employer-employee relationship is clearly evident in this case.

In Ring v. Spina, the Dramatists' Guild of the Author's League of America, an association of playwrights, required through its Minimum Basic Agreement certain minimum terms, unrelated to any services to be rendered by playwrights but specifically detailing the conditions under which playwrights would license or sell their works to producers. The plaintiff producers alleged that in compelling them to accept such minimum terms, the Dramatists' Guild was acting in restraint

of trade in violation of the antitrust laws. The Court held that authors were not entitled to the labor exemption because they were not employees of the producers.

> An author writing a book or play is usually not then even in any contractual relation with the producer.... The minimum price and royalties provided by the Basic Agreement, unlike minimum wages in a collective bargaining agreement, are not remuneration for continued services, but are the terms at which a finished product or certain rights therein may be sold. (At p. 652)

In contrast, a director of Broadway plays has nothing to sell but his services. Unlike the author, he does not deliver a completed work or product; rather, while under contract he renders services for the producer who is responsible to his financial backers for the finished product — the play.

In Bernstein v. Universal Pictures, Inc., supra, composers and lyricists alleged that producers of motion pictures and television had unlawfully combined to compel composers and lyricists to surrender certain rights in their music as a condition to being retained by the defendant motion picture and television companies. The defendants relied upon the labor exemption, but the Second Circuit, in reversing the District Court's decision granting summary

judgment to defendants, took notice of substantial evidence in the record indicating composers are not employees. Composers contract for a specific output, work at their own pace at home, and are not subject to day-to-day supervision by the producers.

Again it is appropriate to observe that directors do not contract to sell or turn out a specific product. They contract to render services that are subject to day-to-day control of the producer. As noted by the Court below, "in sharp contrast to the playwrights in the Ring case and the lyricists in the Bernstein case, ... defendant has demonstrated at trial that directors are employees of producers." It follows that the employer-employee relationship is the matrix of the controversy and, as a consequence, defendant is exempt from the prohibitions of the antitrust laws.

POINT IV

The Court's Review is Limited to Determining Whether the Lower Court's Decision was Clearly Erroneous

Where a trial without a jury involves disputed factual issues, the findings of fact by the trial court

should not be set aside unless clearly erroneous, and they are not clearly erroneous unless on the entire record the reviewing court is left with a definite and firm conviction that a mistake has been committed. C.I.R. v. Duberstein, 363 U.S. 278 (1960); McAllister v. United States, 348 U.S. 19 (1954); Interphoto Corp. v. Minolta Corp., 417 F.2d 621 (2nd Cir. 1969).

Facts stated in the trial court's findings must be taken as established on the appeal when they are supported by evidence. United States v. Adler's Creamery, Inc., 107 F.2d 987 (2nd Cir. 1939). The trial record in this case is replete with evidence supporting the decision of the court below. Its decision is not erroneous.

POINT V

The Injunctive Relief Demanded by Plaintiff Should not be Granted in the Absence of an Indispensable Party

Although the District Court obviously did not reach the question of relief to be afforded plaintiff, it is not inappropriate to point out that the District Court was proscribed from granting the relief requested by plaintiff even if the Court's findings

of fact were contrary to those enunciated. In his prayer for relief, plaintiff requests the Court to permanently enjoin the enforcement of the collective bargaining agreement between the defendant and the League, but he has failed to join the League as a party to the action.

In Shields v. Barrow, 58 U.S. 130 (1855), the Supreme Court ruled that persons having an interest in the controversy of such a nature that a final decree cannot be made without affecting that interest or "leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience" are indispensable parties to the action. The Court went on to say:

> ... but, as is observed by this court... when speaking of a case where indispensable parties were not before the court, we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court. (p. 141)

The Supreme Court later noted in Barney v. Baltimore, 73 U.S. 280 (1868), that there are three classes of parties. There is a class of persons having such relations to the

matter in the controversy that, while they may be called proper parties, the court may proceed without their presence. Secondly, there is a class of persons whose interests in the controversy are such that they should be made parties if they are within the jurisdiction of the court. Thirdly, there is a class of persons whose interests in the action are such that their presence is absolutely essential and the court cannot proceed in their absence.

> And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subject to the jurisdiction. (p. 284)

Rule 19 of the Federal Rules of Civil Procedure does not break with the judicial precedents established in Shields v. Barrow, supra, but continues the principle of the indispensable party as basic to due process concepts. If a persons's interest in the subject matter of the suit is such that the disposition of the action may impair or impede his ability to protect that interest, or leave any of the existent parties subject to substantial risk of incurring inconsistent obligations, the Court should order such person to be made a

party.

There appears to be a dearth of cases ruling on the status of parties in injunction actions. Judge Learned Hand, however, stated that all parties to a contract where an injunction is at stake must be present before the Court. Roos v. Texas Co. 23 F.2d 171 (2nd Cir. 1927)*. See also The Bootery, Inc. v. Washington Metropolitan Area Transit Authority, 326 F. Supp. 794 (D.D.C. 1971).

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* At first blush, United States v. Western Union Telegraph Co., 53 F. Supp. 377 (S.D.N.Y. 1943) appears to hold contrary to Roos. The United States sought injunctive relief against enforcement of exclusive contracts entered into by defendants and other parties and to restrain defendants from executing similar contracts in the future. Defendants' motion to dismiss for want of indispensable parties was denied. However, by the time of the motion, the government had reduced its demand for relief to an "injunction against the defendants and it asks for nothing more.... The Government asks for no relief whatsoever except against these defendants that are before the Court." The court apparently interpreted this as a withdrawal of the demand for an injunction against enforcement of the existing contracts and that the government only sought an injunction against defendants' negotiation of future contracts.

A formula for ascertaining the indispensability of a party was established in Washington v. United States, 87 F.2d 421 (9th Cir. 1936). After first determining that a party is interested in the controversy, the court must answer the following questions: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made have no injurious effect on the interests of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience? If any of the four questions is answered in the negative, then the absent party is indispensable.

The League's interest is not distinct and severable from that of the defendant. They both benefit from the implementation of the terms of the collective bargaining agreement, and the issuance of an injunction against its enforcement will destroy those benefits for the League as well as for the defendant. The Court cannot render justice between plaintiff and defendant in the League's absence as there is no rational basis for the Court to rule that the collective bargaining agreement should be enforced with respect to other producers but not plaintiff. Moreover, an injunctive decree would have a wholly injurious effect upon the League

as it along with the defendant depends upon the order and harmony that the collective bargaining relationship has brought to the profession (107A). There is no evidence that the League desires the destruction of this relationship*. Finally, the issuance of an injunction without the League's presence is inconsistent with equity and good conscience, as the League should be granted the opportunity to defend the agreement against the charges asserted by plaintiff.

The League is an indispensable party whose absence mandates a dismissal of plaintiff's claim for injunctive relief.

CONCLUSION

Directors of Broadway productions are employees of the producer and as such are entitled along with the defendant to claim the benefits of the labor exemption to the antitrust laws. Injunctive relief is an improper remedy

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* Producers have achieved clear benefits under these agreements. See e.g. paragraph 10 of the 1972 Agreement (305A-307A).

as the Court is prohibited from granting such relief in the absence of an indispensable party.

The decision and order of the District Court should be affirmed.

Respectfully submitted,

BATTLE, FOWLER, LIDSTONE, JAFFIN, PIERCE & KHEEL

Of Counsel:

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